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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 916

ROBERT E. FIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ROBERT E. FIELD, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on February 19th, 1959.

OPINION BELOW

The opinion in the Court of Appeals (App. infra pp. 1 to 13) is reported in 263 F.2d 758 to 764.

JURISDICTION

The judgment of the Court of Appeals was entered February 19, 1959 (App., infra, p. 14). The jurisdiction

of this Court is invoked under 28 U.S.C.A. 1254 (1). The jurisdiction of the United States District Court, for the Southern District of Florida was invoked under Rule 41, infra Pages 4 to 7.

QUESTIONS PRESENTED

QUESTION NO. 1

THE OWNER OF CERTAIN MONEY WAS ARRESTED WHEN HE APPROACHED A BUILDING WHICH WAS BEING SEARCHED UNDER AUTHORITY OF A SEARCH WARRANT WHICH HAD BEEN ISSUED IN CONNECTION WITH THE ATTEMPTED ENFORCEMENT OF THE GAMBLING TAX LAWS. INCIDENT TO SAID ARREST, HIS PERSON WAS SEARCHED, AND CERTAIN PROPERTY, DOCUMENTS AND THE SUM OF TEN THOUSAND DOLLARS WHICH HE HAD ON HIS PERSON WERE SEIZED. MOTION WAS SEASONABLY MADE TO SUPPRESS THE EVIDENCE THUS SECURED, AND FOR RETURN OF THE MONEY SO SEIZED.

THE ARREST AND THE SEARCH AND SEIZURE WERE ALL HELD TO HAVE BEEN ILLEGAL. THE EVIDENCE WAS ORDERED SUPPRSSED. THE MONEY AND PROPERTY WERE ORDERED RETURNED.

MOTION WAS MADE TO AMEND THE ORDER FOR THE RETURN OF THE MONEY

ON THE GROUND THAT, AFTER THE ARREST AND SEIZURE OF THE MONEY, THE AGENT HAVING POSSESSION OF THE MONEY HAD BEEN SERVED WITH A NOTICE THAT A LIEN FOR TAXES, CLAIMED TO BE DUE FROM THE PERSON SO ARRESTED, HAD BEEN SERVED UPON HIM, AND ASKING PERMISSION TO CONTINUE TO HOLD SAID MONEY UNDER SAID LIEN. THIS MOTION WAS GRANTED, AND THE AGENT AUTHORIZED TO RETAIN SAID MONEY "PENDING THE DISPOSITION OF THE TAX CLAIMS".

DOES THE ENTRY OF THE LAST MENTIONED ORDER VIOLATE THE OWNER'S RIGHTS UNDER THE FOURTH AMENDMENT?

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41, of the Federal Rules of Criminal Procedure provides as follows:

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds For Issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., §957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized

to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) **Execution and Return with Inventory.** The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion For Return of Property and To Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The

term "property" is used in this rule to include documents, books, papers and any other tangible objects. As amended Dec. 27, 1948, eff. Oct. 20, 1949.

We are aware that this search and seizure was claimed to have been made "as incident to a lawful arrest", and therefore the above rule may not apply, except as to procedure to suppress the evidence for return of the property.

STATEMENT OF FACTS

This case arose as the results of the arrest of appellant on September 21st, 1957, and the ensuing seizure of certain property, including $10,000.00 in cash and certain papers.

The arrest was made at a time when certain premises known as 5422 North East First Avenue, Miami, Florida, controlled by one George Gillespie, were being searched under a search warrant.

Appellant, desiring to talk to said George Gillespie on a private matter, drove to the vicinity of the premises, parked his car, and approached the premises. When appellant had reached a point a few feet from the building which was being searched, he was arrested by an Internal Revenue Agent, who was armed with a revolver. Said arresting agent ordered appellant to enter said building, which he did. There he was searched and certain papers which he had, and the sum of $10,000.00 which he had in his pocket, were seized. His automobile was also seized.

No preliminary hearing was held, though one had been set. Before the date set for the hearing, in October of 1957, the United States Attorney filed a criminal information against appellant and said George Gillespie. This information has now been dismissed as to appellant, we may presume, because there was not sufficient evidence to justify prosecution.

Petition to suppress, and for return of property as provided by Rule 41, was seasonably filed; testimony was taken. The petition to suppress was granted.

An order granting the motion to return the property and money seized was filed February 11, 1958; motion to amend this later order was filed, based upon an allegation that liens had been filed against appellant in a large amount. Two amended orders were filed, each dated March 23, 1958, and filed April 24, 1958. The effect of these orders was to order all documents and property seized at the time of the arrest returned to appellant, except the $10,000.00 cash.

REASONS FOR GRANTING THE WRIT

In this matter, we are presented with a question involving the extent of the protection afforded by the Fourth Amendment.

What are unreasonable searches is to be determined in the light of what was considered unreasonable at the time the amendment was adopted.

Boyd v United States, 116 U.S. 616; 29 L.Ed. 746

* There is presented an important question of Federal law which has not been but should be decided by the Supreme Court.

Weeks v United States, 232 U.S. 383; 58 L.Ed. 652

The amendment must be liberally construed in the interest of protecting individual liberty.

U. S. v Bell, 48 Fed. Supp. 986

Grau v U. S., 287 U.S. 124; 77 L.Ed. 212

Gobart Importing Co. v U. S., 282 U.S. 344; 75 L.Ed. 374

Carroll v U. S., 267 U.S. 133; 69 L.Ed 543.

In this case the search and seizure has been held to be unreasonable. So that question is no longer open. The question now presented is whether or not the government will be given an advantage by reason of a search and seizure now established to have been unlawful. If so, to the extent of the advantage accuring to the government, and the corresponding detriment to the petitioner, the offended party has been deprived of the protection of the amendment.

No statute, or rule of Court, can deprive petitioner of the rights so guaranteed.

The proceedings for suppressing evidence and return of property were under Rule 41. This rule has the force and effect of law. The United States grounds its present position on that part of the rule which directs the return of property taken under an unlawful search "unless otherwise subject to lawful detention".

This poses several questions as to what circumstances will render the property "otherwise subject to lawful detention". If the article be contraband

Trupiano v United States, 334 U.S. 699; 92 L.Ed. 1663

United States v Jeffers, 342 U.S. 48, 96 L.Ed. 59

or stolen property

Scott v United States, 149 Fed. Supp. 837.

it is "otherwise subject to lawful detention". Doubtless other instances where the person from whom the property was unlawfully seized, at the time of seizure, has no right to its possession, will, from time to time arise. Counterfeit money would clearly be in the same category.

In each of the above cases, the property was "otherwise subject to lawful detention" because of some quality or attribute **attaching to it at the time of seizure.** This circumstance, and the very nature of the situation suggests that the time element is important, and that the **deciding element** is the status at the time of seizure.

In this case, the government contends that, notwithstanding the fact, that at the time of seizure, the property was **rightfully** in the possession of appellant and was wrongfully seized, and that at all times, for many days after the seizure, and for many days after petition for restoration was filed, the government grounded its right to keep the property entirely upon the arrest and accompanying seizure, it, nevertheless now has a right to retain the property for another reason.

This latter claim is predicated solely on the fact, that, subsequent to the seizure and filing petition to suppress and for return of the property, the government filed a tax lien against the petitioner and his property.

Thus we are presented with an astounding claim. In substance, it amounts to this:

1) The government may wrongfully seize property in violation of the owner's constitutional rights.

2) It may retain the property pending a decision on a Petition for Restoration.

3) While the Petition for Restoration is pending and undisposed of, the government, without assent, express or implied from the offended party, and solely by its own action, may completely nullify the rights of the offended party under the Fourth Amendment, and secure all benefits of possession of the property to itself.

Thus, frankly stated, the government contends that its rights to collect taxes is paramount to the rights of its citizens under the Fourth Amendment. Specious argument may be offered to explain the government's present position. But the practical effect is that petitioner will lose the benefit of the amendment, and the government will correspondingly gain what petitioner loses.

To me, it is inconceivable that the government, by virtue of things done by it, after petitioner's rights were violated, can effectively deprive him of a considerable part of those rights.

This brings us to a critical consideration of the rule and the words, "unless otherwise subject to lawful detention". To what time do the quoted words of the rule apply? To me, it seems incongruous to attempt to read into the rule a provision, the effect of which would be that, **after the rights have been violated**, the government may take action which changes the status of the property and the rights of the injured party in reference thereto. Thus, by its own action alone, the **government would nullify the very rights** which it has violated. Such a position, if sustained, would largely nullify the amendment.

Therefore, I submit that any facts rendering the seized property "otherwise subject to lawful detention," **must have existed at the time of seizure.** In making this statement, I do not wish to be understood as conceding (in fact, I deny) that, had the lien been of record at the time of the arrest and seizure, the property would be subject to "lawful detention". I am naive enough to believe that "the right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures" is of more importance than is the right of the government to collect a few thousand dollars on the basis of a lien, the legality of which has not, as yet, been supported by evidence, or otherwise than the "ipsi dixit" of some administrative officer. And I am not alone in this thought. In his concurring opinion in **McDonald v United States**, 335 U.S. 451, 93 L.Ed. 153, on Page 161, Mr. Justice Jackson had this to say:

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of

the people against unreasonable searches and seizures."

Unless the Courts are to reverse their often announced policy that the amendment must be liberally construed in the interest of protecting individual liberty, the government should not be permitted, directly or indirectly, to gain any advantage to itself, or impose any detriment upon the offended party, by reason of its violation of the amendment. This seems so manifestly true, that it should require no argument.

From this, it would inevitably follow that (save, of course, in the case of contraband, stolen property and the like as mentioned supra) a complete restoration of the status quo in respect to seized property or documents, as well as suppressing the evidence, is mandatory. Otherwise, in many if not most cases, the offended party will suffer, and thus the amendment will be partially ineffective.

To be specific: In this case. Had the improper arrest and seizure not occurred, the government, in all probability would never have thought of filing a lien against Field. This is true because, eliminating this improper arrest and seizure, the government would have had no evidence at all supporting the levy of this lien. Thus, the very existence of the lien itself resulted from a violation of the Fourth Amendment.

But arguendo, let us assume that, at the time of its now established violation of appellant's rights under the amendment, the lien now existing had already been filed of record. Let us further assume that said lien was, in all respects, valid. Let us further assume that the govern-

ment had, antecedent to the violation of appellant's rights been unable to even partially satisfy its lien by levy and seizure of goods or money.

With this state of a completely unsatisfied valid lien, let us assume that the instant illegal arrest and seizure had occurred, and by its **illegal act**, the government comes into control of the Ten Thousand ($10,000.00) Dollars in question. Will anyone having the slightest regard for the Fourth Amendment seriously suggest that the government should be allowed to take advantage of its own wrong, and keep the money, so wrongfully seized. Such a suggestion should be abhorrent to any person having the slightest regard for the amendment.

Welsh v United States, 220 Fed.(2) 200 is not controlling.

Farley v Manning, 73 Atl. (2) 551

U. S. v Willman, 63 Fed. Supp. 535 and

United States v City of New York, 82 Fed.(2) 242, cited in the Welsch case are not contrary to the contention here made.

The language of the Court in the Welsh case (page 202) referring to the Fourth Amendment:

> "The right is **primarily** safeguarded by suppressing the evidence secured as a result of the violation when it is tendered in a Federal Court"

cannot be taken to limit the protection to the suppression of evidence. But where, as in the instant case, suppressing

evidence gives only partial protection, full protection should be afforded by completely restoring the status quo—by taking the property from the government and returning it to the person from whom it was wrongfully taken; and this, regardless of the fact that there may be a lien against the property of such person. Less than that would make the amendment only partially affective.

The suggestion of the Court in the Welsh case (page 202)

> "There is no guarantee in the Fourth Amendment that illegally seized property must be returned to the owner"

does not justify the conclusions reached there by the Court. Neither does the amendment by specific words provide that the thing, whatever it may be, whether documents, property or otherwise, shall be suppressed as evidence. What the amendment does do is to **fully protect, to whatever extent the facts make necessary or appropriate,** the rights of the people against **unreasonable searches and seizures.** Not **half** protection but **full** protection is provided as required by the exegebcies of the case. Constitutional provisions do not and can not spell out procedures to fit each case.

CONCLUSION

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17319

ROBERT E. FIELD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 19, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge: The question here is whether property seized in violation of the requirements of the Fourth Amendment, during the enforcement of criminal laws, is thereby insulated from statutory proceedings for the assessment and collection of Federal taxes. Stated in another way the precise problem is whether, after a final order under Fed. R. Crim. P. 41(e) suppressing use of the property as evidence, the Court may decline to order an unconditional surrender and re-

turn of the property involved to the owner because, subsequent to the order of suppression but prior to its return, the property is levied on for the collection of assessed taxes. By supplemental decree the District Court ordered that as to this property ($10,000 in cash), it would "permit the retention of said sum pending disposition of the tax claims."

As the order of suppression has long since become final by a subsequent dismissal of the criminal information, cf., *Zacarias v. United States*, 5 Cir., 1958, ... F.2d . . . . [No. 17440, Dec. 2, 1958], we may properly summarize the facts in their most extreme form.

After several weeks of careful surveillance of an apartment building in Miami, Florida, suspected of being the headquarters of a numbers racket operation, ten officers of the Internal Revenue Service accompanied by the United States Attorney made a raid about 4:30 on a Saturday afternoon. The officers had a search warrant covering the premises. All but one of the party entered the premises, where arrests of others were made and where ample evidence was found of violation of the Federal Wagering Excise Tax Law, 26 USCA §§4411, 4412, 4901 (a) and 7203.

As Field, the appellant here, was suspected of being the principal banker, but had not yet been observed going into the building as was his routine custom at this time each Saturday afternoon, one agent remained outside. He furtively concealed himself behind a tree in the ex-

pectation that Field would arrive. He was not disappointed. Shortly, Field came on the scene in his flamingo and charcoal Chevrolet Bel-Aire sedan. When Field, walking toward the building, got within two steps of the front door, the Agent stepped out from his place of hiding, said "Hello" and with drawn pistol pointed toward the ground, not Field, suggested that Field go inside. Once inside, he was arrested and searched or searched and arrested. The main fruit of the search was the $10,000 in cash found on his person.

Field moved under Fed. R. Crim. P. 41(e), for suppression and return of the property[1] taken from him. This motion was heard after criminal proceedings had been commenced by an information. The Court granted, and on rehearing reaffirmed the grant of the motion. No opinion or formal findings were made by the Judge. But it is plainly evident that the Court concluded that from what the agent knew and could then see about Field, he had no reasonable grounds for his coercive action. Faced by an agent with a gun in his hand, Field's movements into the house were not voluntary. It was, the Court concluded, an arrest accomplished with force, without a warrant, and without probable cause. We take it on that basis.

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1 The property was listed in the motion and orders of suppression as:

"1. Cash $10,000.00.
"2. One Four Door Bel-Aire Chevrolet Sedan, Motor Number 0078577-F55F.
"3. One set of keys for above car.
"4. One small black address book labeled 'Tower of Jewels'.
"5. One business card with writing on reverse side.
"6. Three slips of paper with writing thereon.
"7. One Standard Analysis Bookkeeping Pad No. 4506."

After the order[2] of December 13, 1957, granting the motion to suppress, the Court, pursuant to a separate motion for return of the property, entered a separate order on February 3, 1958, mandatorily requiring that all of the property as listed in note 1, *supra*, "be returned to * * * Field, said return to be made by whomsoever has the present possession of said property."

But before the property was returned, the Government sought amendment of that order with respect to Item 1, the cash, and Item 2, the Chevrolet, see note 1, *supra*. As to the cash, it was established without contradiction that on December 13, 1957, the very day of the initial order of suppression, note 2, *supra*, "the person having custody of the * * * cash was duly served with a Notice of Levy by the Collection Division of the Internal Revenue Service at Miami, Florida, with respect to wagering excise taxes due and owed * * * by * * * Field."[3] This motion was granted as to the cash but denied as to the Chevrolet.[4]

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2 It was in sweeping terms:
"[I]t is * * *,
"Ordered and Adjudged that said motion be and the same is hereby granted and all statements made by and all money or property seized and all evidence secured from said Defendant, Robert E. Field, subsequent to his arrest be and the same is hereby suppressed and the same shall never be used at any time in any proceedings, Civil or Criminal involving said defendant, Robert E. Field."

3 Taxes assessed and claimed were in the amount of $45,954.63. It was stated that such Notice of Levy notified "the said holder of the said property that all moneys in his possession and belonging to [Field] were thereby levied upon and seized for satisfaction of the aforesaid tax."

4 The Court in its amended order, March 23, 1958, treated the cash as having been "* * * properly levied upon by Collection Officers of Internal Revenue Service by levy upon Special Agents of the Intelligence Unit having custody of said $10,000.00 * * *" so that the prior return order of February 3, 1958 should "be amended to permit the retention of said sum pending the disposition of the tax claims."

With great tenacity and moving sincerity, the earnest advocate for Field invokes the Fourth Amendment to strike down this result which he thinks highhanded and lawlessness in the name of law. If this can be done in the interest of the sovereign's well-nigh insatiable need for tax revenues, then, he says, tax collectors may arm themselves as vigilantes, descend upon unwary citizens on the public streets, their places of business, and, yea, even as here within the confines of someone's home and there, by pointed and loaded gun, extract what is administratively claimed to be due but tardily unpaid as a Federal tax.

Without a doubt there are disturbing implications in this case. But we do not yet face any of the extremes so readily and dramatically imagined. These we do not decide. For wise reasons, we may not, if we could, be prophets of the Constitution. *Massachusetts v. Mellon*, 1923, 262 U.S. 447, 488, ... St.Ct. . . . . , . . . , 67 L.Ed. 1078, 1085; *The Charles River Bridge v. The Warren Bridge*, 1837, 36 U.S. (11 Peters) 420, 553, 9 L.Ed. 773, 826; 11 Am. Jur., Constitutional Law §93 (1937). If there is thought to be within this less flagrant case the seeds of those more serious, then we think it cannot yet be said that such an assumed violation of the Fourth Amendment insulates the property from its tax subjugation.

We say it in these terms for Field misapprehends the present state of the law, and if his contention is to succeed it requires that we carry the principles way beyond their present boundaries. Basically, his difficulty is that he fails to heed the distinction so often pointed out between

those actions which are held to violate the Fourth Amendment and the sanctions which the Judiciary does, or may, impose.

The usual sanction is the exclusion of the ill-gotten fruits as evidence or the means to evidence. But to this day, at least, there is no holding that the Constitution compels this sanction. If one reads and assimilates as a composite whole the significant decisions[5] in this area, some rather certain principles can be drawn. The Fourth Amendment applies, of course, directly to proceedings in the Federal Courts. The Fourteenth Amendment embraces the concept of the Fourth Amendment, so its commands lay on the states as well. Notwithstanding this, the states are not compelled to apply the same sanctions as would the Federal Courts in testing a Federal prosecution. This is so in part because the sanction of exclusion of evidence is not one self-generated by the Fourth Amendment. It is rather, the means fashioned by the Judiciary as one thought to be most effective in carrying out the evident demands and policy reflected by the Fourth Amendment. The *Weeks* Rule of Exclusion "• • • was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the

[5] Benanti v. United States, 1957, 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed.2d 126; Rea v. United States, 1956, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233; Irvine v. California, 1954, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561; On Lee v. United States, 1952, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270; Rochin v. California, 1952, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; Lustig v. United States, 1949, 338 U.S. 74, ... S.Ct....., 93 L.Ed. 1819; Wolf v. Colorado, 1949, 338 U.S. 25, ...S.Ct....., 93 L.Ed. 1782; McNabb v. United States, 1943, 318 U.S. 332, ...S.Ct....., 87 L.Ed. 819; Weeks v. United States, 1914, 232 U.S. 383, ...S.Ct....., 58 L.Ed. 652.

Constitution. The decision was a matter of judicial implication.[6] * * * And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine."[7] *Wolf v. Colorado*, 1949, 338 U.S. 25, 28, 33, ... S.Ct. . . . . , ... , ... 93 L.Ed. 1782, 1786, 1788. The Judge made genesis' of the exclusionary rule was reiterated in *Irvine v. California*, 1954, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561. "*Wolf* * * * declined to make the subsidiary procedural and evidentiary doctrines developed by the federal courts limitations on the states. * * * Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Fed. Rules of Crim. Proc., 26." 347 U.S. at 132, 134-35, 74 S.Ct. at . . . . . 98 L.Ed. at 569, 570.

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6 This was highlighted by Mr. Justice Black's concurrence: "But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. See McNabb v. United States, 318 U.S. 332." 338 U.S. at 39-40, ... S.Ct. at . . . . . , 93 L.Ed. at 1792.

7 The Court stated On Lee v. United States, 1952, 343 U.S. 747, 755, 72 S.Ct. 967, ... 96 L.Ed. 1270, 1276, "In order that constitutional or statutory rights may not be undermined, this Court has on occasion evolved or adopted from the practice of other courts exclusionary rules of evidence going beyond the requirements of the Constitution or statutory provision. McNabb v. United States (U.S.) supra; Weeks v. United States, 232 U.S. 383."

Indeed, the Court by a recent unanimous pronouncement[8] recognizes that there may be considerable doubt whether this exclusionary sanction extends beyond the Court's asserted supervisory powers over Federal law enforcement agencies as applied in *Rea v. United States*, 1956, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233; cf. *McNabb v. United States*, 1943, 318 U.S. 332, ... S.Ct. . . . . , 87 L.Ed. 819.

We are of the firm view, then, that as thus far construed the Constitution does not itself compel the exclusion of the results of the search for evidence. *A fortiori*, it does not compel the sanction sought here.

Of course, to accept this thesis briefly summarized that the exclusionary sanction is judge-made does not necessarily end the matter. If the Judiciary, to effectuate the policy of the Fourth Amendment, may fashion this means, it could, we think within reason, fabricate others thought suitable or perhaps desirable. That might include the insulation of the fruits of an illicit search against the usual amenabilities of property.

[8] In Benanti v. United States, 1957, 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed. 2d 126, a Federal Court conviction is invalidated because of evidence obtained by a state officer pursuant to state law but in violation of Section 605 of the Federal Communications Act, 47 USCA. The Court expressly declined to rule on the petitioner's contention that the wire-tap evidence was excluded by the Fourth Amendment. Its footnote 10 was highly significant: "It has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. See Lustig v. United States, 1949, 338 U.S. 74, 78, 79, 69 S.Ct. 1372, 93 L.Ed. 1819, 1823. The instant decision is not concerned with the scope of the Fourth Amendment." 355 U.S. at 102, 78 S.Ct. at ....., 2 L.Ed.2d at 131. See Williams, Comment; 36 Tex.L.Rev..... (1958).

Such an inquiry has two facets: (1) has any such sanction yet been established either expressly or by implication; (2) if not, should it be? So far as a categorical declaration of any such sanction is concerned, the first is easily answered in the negative. What jurisprudence there is is all to the contrary. *Welsh v. United States*, D.C. Cir., 1955, 220 F.2d 200. Nor do we find it in Fed. R. Crim. P. 41 which the Court has held "implements the Fourth Amendment." *Jones v. United States*, 1958, 357 U.S. 493, 498, ... S.Ct. . . . . , 2 L.Ed. 2d 1514, 1518.

Rule 41(e) does provide that "the property shall be restored unless otherwise subject to lawful detention." But we do not read this as a determination by the Supreme Court that to the sanction of exclusion it means to add the further one of insulation of property. It was first a recognition that by statute and by prior decision, certain kinds of property, e.g., contraband, deleterious products, etc., were to be condemned, forfeited or destroyed. *Trupiano v. United States*, 1948, 334 U.S. 699, ... S.Ct. . . . . , 92 L.Ed. 1663; *United States v. Jeffers*, 1951, 342 U.S. 48, ... S.Ct. . . . . , 96 L.Ed. 59. It was further a recognition that there were, or at least might be, other circumstances in which, after the full protection afforded by the Fourth Amendment had been achieved by excluding it as evidence, the property was otherwise subject to some rightful claim of the Government.[9]

[9] It is interesting, if not decisive, that in the analysis and counter-analysis of the effectiveness of various sanctions open to one aggrieved by transgressions of the Fourth Amendment on the part of a law enforcing officer, none has discussed the likelihood

With the Court inescapably faced with the undefinable task of determining whether fundamental constitutional concepts have been breached in individual cases, cf. *Rochin v. California*, 1952, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; *Irvine v. California*, *supra*; *On Lee v. United States*, 1952, 343 U.S. 747, 72 S.Ct. 697, 96 L.Ed. 1270, it would have been strange for the Court, through a rule intended primarily to regulate procedure, to have written out all of these troublesome problems by any such mechanical test.

We hold, therefore, that neither by force of the Constitution, its contemporary interpretation, the supervisory sanctions over Federal law enforcement agencies, or the formal Federal Rules of Criminal Procedure, did this property acquire a status that put it over and beyond the law to thus free it of the obligations which it would otherwise have.

Once that decision is reached, the problem is reduced here to the simple task of applying the long-enacted tax laws. With an all-inclusiveness and an administrative swiftness that ofttimes brings harsh results, the pattern of Federal tax enforcement statutes sweeps all save wearing apparel, school books, $500 worth of fuel, victuals, poultry and livestock and $250 worth of books and tools of the trade under the Collector's levy. Int. Rev. Code of 1954 §6334(a), 26 USCA.

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that the property thereby becomes freed of its normal obligations. See the majority and dissenting opinions in Wolf v. Colorado, 1949, 338 U.S. 25, ...S.Ct....., 93 L.Ed. 1782; Irvine v. California, 1954, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561.

Failure to pay a Federal tax authorizes a levy "upon all property and rights to property (except such property as is exempt under Section 6334) belonging to such person or on which there is a lien provided * * * for the payment of such tax." §6331. The exemption itself affirms the all-pervasive reach of the levy. "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." §6334(c). It reaches all such property whether in possession of the owner or in the possession of third parties or agencies. Under civil sanctions, they are obligated to hold and surrender it to the Collector pursuant to the levy. §6332. Property levied on, real or personal, is subject to sale, §§6335, 6336, 6338, 6339. But provision for sale does not negate the levy on money requiring no sale. For Section 6342 provides that "Any money realized by proceedings under this chapter (whether by seizure, by surrender under Section 6332, or by sale of seized property) shall be applied * * *" as there set forth. The mechanics of a levy and of a jeopardy assessment and levy are swift and summary. §§6862, 6331 (a). The remedy of the property owner is by redemption before or after satisfaction, §6337, or by a stay bond. §6863(a). The taxing authorities' legal discretion in the use of jeopardy assessment and levy is not reviewable. *Lloyd v. Patterson*, 5 Cir. 1957, 242 F.2d 742. Injunctions are prohibited by Section 7421(a) unless, as not present here, there are truly extraordinary circumstances. *United States v. Curd*, 5 Cir., 1958, 257 F.2d 347.

This cash was admittedly, or claimed as, property of Field. It came within the statutory definition of property. The tax was duly assessed and the levy made on the one having its possession. The levy is different from the mere lien of Section 6321. For the Collector is authorized "to *collect* such tax * * * by levy upon all property." §6331 (emphasis supplied). The Federal Court, ancillary to a criminal proceeding then pending or previously terminated, cannot under the guise of effectuating Fed. R. Crim. P. 41(e), assume a power to adjudicate tax liability either of a taxpayer or of property. Except in the rare case where injunction is permitted, §7421(a), this power is confined to actions under Sections 7403, 7424 and the traditional suit for tax refund. §7422.

The citizen owes his tax to the sovereign. The citizen's property may be seized by levy to satisfy that tax. As long as it is his property, unencumbered by a lien having tax priority, the levy follows the property into the hands of whomsoever it might fall. Property stolen from the taxpayer would be liable to levy in the thief's hands. Here, had the cash been surrendered to Field pursuant to the initial suppression order the moment it was put back into Field's hand it would have been subject to immediate levy.

What Field wants then is a credit of $10,000 on his tax which no other citizen can have.[10] The statutes give him no such priority.

[10] It should be borne in mind that unlike the abortive attempt to subject the Chevrolet to forfeiture under Section 7325, this levy is in no sense a penalty. It is a means of securing collection of taxes due. Any surplus remaining after full payment of the taxes finally determined is to be returned to Field. §6342(b).

The Constitution is his only haven. For obvious reasons, such partiality is not one of those cherished marks of "the concept of ordered liberty." *Wolf v. Colorado, supra*, 338 U.S. at 27, . . .S.Ct. at . . . , 93 L.Ed. at 1785. The Constitution fails him too.

Like any other citizen, whether maltreated or ignored by public officers, Field's fortune must bear to the point of exhaustion his full tax burden.[11] None of it is insulated by these actions from its amenability.

AFFIRMED.

[11] Obviously nothing we say has any effect as to the ultimate question of the validity of the tax assessed, the assessment, the levy or the amount of taxes due. The order of suppression, note 2, supra, does, of course, forbid the use of this sum of money, or evidence of it, for any purpose, civil or criminal, in the establishment of such tax or penalties.

Filed, Miami, Fla., Mar 27 1959, Julian A. Blake, Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1958

No. 17,319

D. C. Docket No. 10,393-M-Crim.

ROBERT E. FIELD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Tuttle, Jones and Brown, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed.

February 19, 1959.

Issued: Mar 25 1959

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
Mar 25, 1959

I certify the foregoing to be a true and correct copy of the original.

JULIAN A. BLAKE, Clerk
United States District Court
Southern District of Florida

By: EARLE F. SPRIGG
Deputy Clerk

FILE COPY

No. 916

In the Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT E. FIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH F. GOETTEN,
JOSEPH KOVNER,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 1–13) is reported at 263 F. 2d 758.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1959. (Pet. App. 14–15.) The petition for certiorari was filed on May 12, 1959. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the government may levy upon a taxpayer's property which was seized from his person after an arrest and thereafter ordered suppressed as

evidence in a criminal prosecution on the ground that it was the product of an illegal search and seizure.

STATUTES AND RULES INVOLVED

Sections 6321, 6331, and 6332 of the Internal Revenue Code of 1954, and Rule 41(e) of the Federal Rules of Criminal Procedure are printed in the Appendix, *infra*, pp. 8–9.

STATEMENT

The undisputed facts are set forth in the opinion below (Pet. App. 2–4), and can be briefly summarized as follows:

On September 21, 1957, agents of the Intelligence Division of the Internal Revenue Service, accompanied by the United States Attorney, conducted a raid on an apartment building in Miami, Florida, suspected of being the headquarters of a numbers racket operation. The officers had a search warrant covering the premises; they entered the premises and arrested several persons in the apartment, having found ample evidence of violation of the occupational tax and registration requirements of the wagering excise tax provisions of the Internal Revenue Code of 1954, Sections 4411, 4412, 4901(a), and 7203. The officers did not have a warrant for the arrest of the petitioner, but, since he was suspected of being the principal banker of the operation, an agent was stationed outside of the apartment to apprehend him. The petitioner drove up to the apartment during the raid, left his automobile, and was within two steps of the front door of the apartment building when the agent stationed outside, with drawn pistol, forced the peti-

tioner inside the apartment, where he was arrested and searched. Cash in the amount of $10,000 found on the petitioner's person was taken from him and seized as evidence.[1]

The petitioner was thereupon charged by information with wilful failure to register and to pay the federal occupational wagering tax. (R. 9.) The petitioner promptly moved under Federal Rules of Criminal Procedure, Rule 41(e), for the suppression and return of the property taken from him on the ground that the arrest was "accomplished with force, without a warrant, and without probable cause". (Pet. App. 3.) Following a hearing on this motion (R. 13–68), the District Court granted the motion to suppress the evidence, by order dated December 13, 1957 (Pet. App. 4, R. 68–69). On the same day, the Collection Division of the Internal Revenue Service at Miami, Florida, served on the person having custody of the cash (an agent of the Intelligence Division) a notice of levy with respect to wagering excise taxes due and owing by the petitioner in the amount of $45,954.63. (R. 71.)[2] Later, on February 3, 1958, the District Court entered a separate order directing that all of the seized property, including the $10,000 in cash,

[1] Other property not in issue here was also seized. (Pet. App. 3; R. 10.)

[2] It would appear from the amount of the unpaid taxes, that these taxes were not the $50 occupational tax imposed by Section 4411 of the 1954 Code, which was the subject of the criminal case, but were amounts of the 10 percent excise tax on wagers imposed by Section 4401. There is no question here as to the petitioner's liability for the amount of the taxes claimed in the levy.

forthwith be returned to the petitioner or to his designee. (R. 69–70.)

On February 19, 1958, before the property was returned to the petitioner, the Government moved to amend the return order with respect to the cash in order to protect the levy. (R. 70–71.)[3] On April 24, 1958, the District Court granted the motion and amended its return order to adjudge that the $10,000 was "properly levied upon by Collection Officers of Internal Revenue Service by levy upon Special Agents of the Intelligence Unit having custody of said $10,000" and directed that the cash should be retained "pending the disposition of the tax claims." (Pet. App. 4, R. 72–73.)[4] On the petitioner's appeal (R. 79–80), the Court of Appeals sustained the order and held, contrary to the petitioner's claim, that the Fourth Amendment to the Constitution of the United States did not "insulate" the petitioner's property from the reach of the federal tax levy (Pet. App. 1–13).

ARGUMENT

The decision below is correct and no substantial question of constitutional law requiring a decision by this Court is involved.

In holding that illegally seized property ordered returned to its owner, a delinquent taxpayer, is sub-

[3] The Government also moved to amend the return order with respect to the petitioner's automobile which it claimed was forfeited under Section 7325 of the 1954 Code. The court denied this part of the motion because the forfeiture was made upon an illegal seizure.

[4] The other property was returned to the petitioner (R. 74) and the information against him dismissed because of the suppression of the evidence (R. 77).

ject to levy for unpaid taxes, the court below has not in any way violated the petitioner's constitutional right under the Fourth Amendment to be free from illegal searches and seizures. *Trupiano* v. *United States*, 334 U.S. 699; *United States* v. *Jeffers*, 342 U.S. 48; *Welsh* v. *United States*, 220 F. 2d 200 (C.A.D.C.); Federal Rules of Criminal Procedure, Rule 41(e). (Appendix, *infra*, p. 9.) The instant decision is in accord with the decision of the Court of Appeals for the District of Columbia in *Welsh* v. *United States*, *supra*. Both courts have properly relied upon the repeated decisions of this Court in *Jeffers* and *Trupiano*, that illegally seized property, having been suppressed as evidence, may nevertheless be retained as contraband; and also upon the express provisions of Rule 41(e) itself, that illegally seized property, suppressed as evidence, "shall be restored unless otherwise subject to lawful detention."

The suppression order provided that the evidence "shall never be used at any time in any proceedings, Civil or Criminal," involving the petitioner. (Pet. App. 4; R. 68.) The tax levy does not authorize the use of the cash as evidence of the petitioner's liability for the taxes, if he contests the liability, but merely holds the money as security for payment of a determined or uncontested liability. Hence, the suppression order completely satisfied the judicial implementation of the Fourth Amendment to discourage lawless police action by suppression of illegally seized evidence, even at the risk of freeing guilty persons. *Benanti* v. *United States*, 355 U.S. 96; *Irvine* v. *California*, 347 U.S. 128; *Wolf* v. *Colo-*

rado, 338 U.S. 25. As the court below pointed out (Pet. App. 6–7), the suppression of illegally seized evidence is a judicial "sanction" intended to enforce the Fourth Amendment, which should not be extended to a case where its function is inoperative. There is no showing here that the collection officers of the Internal Revenue Service in any way participated in the illegal search, or that the search was in any way intended to discover leviable property of a delinquent taxpayer. See *Lustig* v. *United States*, 338 U.S. 74; *Byars* v. *United States*, 273 U.S. 28.

On the contrary, the record in this case plainly demonstrates that the arresting officers had only a single object in mind, the seizure of evidence to prove a criminal act. Since the officers acted illegally, the evidence has been suppressed. The wrong has been cured. As the court below further observed (Pet. App. 12), the "moment it [the cash] was put back into Field's hand it would have been subject to immediate levy." The petitioner's contention amounts to a claim that he is not only entitled to a return of the property, but to an immunity of that property from his obligation for unpaid taxes. The petitioner, however, asserts that he was at all times the rightful owner of the cash (Pet. 10); it was, therefore, at all times, properly subject to the payment of his tax debt to the United States, and within the broad sweep of the lien and levy provisions (Appendix, *infra*, p. 8) to secure payment of taxes. *Sims* v. *United States*, 359 U.S. 108.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH F. GOETTEN,
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Attorneys.

JUNE 1959.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., Supp. V, 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

* * * * *

(26 U.S.C., Supp. V, 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such prop-

erty or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * * *

(26 U.S.C., Supp. V, 6332.)

Federal Rules of Criminal Procedure:

RULE 41. SEARCH AND SEIZURE.

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * * *

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